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MICHAEL DUTTON, Warden,
Petitioner,

v.

KENNETH WAYNE O'GUINN,
Respondent.

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On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

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# BRIEF OF AMICI CURIAE STATES OF OHIO, KENTUCKY AND OKLAHOMA IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

May the States expressly waive the right to exhaust federal habeas claims and immediately require federal courts to reach the merits of those claims in order to avoid further delay in enforcing a capital sentence?

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## INTEREST OF AMICI CURIAE

This case presents the Court with an opportunity to resolve a burgeoning conflict among the lower courts on whether the States may expressly waive exhaustion in handling federal habeas corpus claims.

The amici States frequently defend presumptively final and valid state court judgments against federal habeas corpus challenges and accordingly have an acute interest in ensuring that these claims are properly handled by the federal courts. Prohibiting States from waiving the defense of exhaustion in capital cases, as the Sixth Circuit did in this instance, dramatically threatens the States' interests in the enforcement of these judgments. In particular, it allows capital inmates to secure indefinite delays of their capital sentences through the endless and repeated pursuit of "unexhausted" claims. Making matters worse is the fact that the engine that drives this litigation machine is a requirement (exhaustion) that at least originally was designed to respect comity and federalism concerns, not to undermine them. Left unreviewed, however, the Sixth Circuit's position will do just that: It will directly prevent Ohio, Tennessee, Kentucky and Michigan from waiving their own (at least ostensible) protections in this area and will indirectly encourage other circuits (that have not already addressed the issue) to follow suit. Under these circumstances, the amici States urge the Court promptly to review this important federalism issue.

In accordance with Rule 37.4, this brief is submitted in support of petitioner by the amici States through their respective Attorneys Generals.

## REASONS FOR GRANTING THE WRIT

### A. There is a Division of Authority Among the Circuits on the Question Presented.

The first reason for granting the writ is the growing split of authority on this issue. Different circuits have taken different positions on whether the States acting through their attorneys general may waive state-court exhaustion in federal habeas claims. On one side of the split, the Third and Tenth Circuits have prevented the States from expressly waiving their own exhaustion rights. *See Chaussard v. Fulcomer*, 816 F.2d 925, 927 n.1 (3rd Cir. 1987) ("We have held, however, that a state prosecutor cannot waive the state interests embodied in the exhaustion rule."); *Naranjo v. Ricketts*, 696 F.2d 83, 86 (10th Cir. 1982) ("a state waiver or concession of exhaustion in district court is not dispositive of the matter"). It is worth adding that the Tenth Circuit in *Odum v. Boone*, 62 F.3d 327, 333 n.2 (10th Cir. 1995), later modified *Naranjo* to the extent it was contrary to the holding of this Court in *Granberry v. Greer*, 481 U.S. 129 (1987). Neither *Granberry* nor *Odum*, however, directly addressed the issue of express waiver of exhaustion by a state.

On the other side of the split are the Second, Fourth, Fifth, Eighth, and Eleventh Circuits. They have each held that the State's sovereign authority to waive their own state-court exhaustion rights should generally be respected by the federal courts in federal habeas claims. *See Lawson v. Dixon*, 3 F.3d 743, 749 n.4 (4th Cir. 1993) ("Because exhaustion is not a jurisdictional bar, the state may waive it."); *Hampton v. Miller*, 927 F.2d 429, 431 (8th Cir. 1991) ("Federal courts will ordinarily only reject State waiver of exhaustion when doing so avoids injustice or manifestly serves the public interest."); *Plunkett v. Johnson*, 828 F.2d 954, 956 (2d Cir. 1987) ("When a court is convinced that the

petition lacks merit and when the State has waived any exhaustion defense, application of the exhaustion doctrine would merely result in useless litigation in the state courts"); *McGee v. Estelle*, 722 F.2d 1206, 1211(5th Cir. 1984) ("it is a corollary that [the federal courts] should defer equally to the state's desire that federal courts not abide a state court ruling"); *Thompson v. Wainwright*, 714 F.2d 1495, 1505 (11th Cir. 1983) ("The state, then, must be allowed to assert that it wishes to forego the opportunity for initial review in those instances where initial review operates to its disadvantage. It is entitled to decide that this best vindicates its interest."). In addition to these decisions, the Seventh Circuit has held correctly that the federal courts lack discretion in this area: They *must* accept state waivers of exhaustion. *See Barrera v. Young*, 794 F.2d 1264, 1269 (7th Cir. 1986) ("If a state authorizes its Attorney General to surrender the protection of some principle of law on behalf of the state, no principle of federal law interferes. To the contrary, if the federal court refused to accept the waiver, explicit or implicit, by the state through its Attorney General, this would be a meddlesome intrusion into the state's internal allocation of governmental authority.").

Now deepening this split is the Sixth Circuit's decision below. To be sure, the Court's decision on this point can only be described as obscure. It offers no explanation for declining to accept Tennessee's request to waive state-court exhaustion of the *Brady* claim. But, in remanding the federal claim for state-court exhaustion over Tennessee's clear objection, *O'Guinn*, 88 F.3d at 1412, the Court clearly rejected the State's request. *Id.* at 1431 (Boggs, J. dissenting) Worse yet, it apparently did so on a basis that misapprehends this area of sensitive state-federal rights. For it ultimately dismissed the petition in "the interests of justice and comity," *id.* at 1412-13, criteria that should have -- but did not -- require the Court to accept

Tennessee's waiver of its own exhaustion rights. In the last analysis, the Sixth Circuit's decision does not articulate any plausible basis for this result, and the judgment thus implicates and deepens the lower-court split of authority on this issue. Since the Court customarily reviews judgments, not opinions, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *see Texas v. Hopwood*, 116 S. Ct. 2581 (1996), this judgment is ripe for review on this critical states-rights issue.

### B. The States's Sovereign Authority to Waive Exhaustion in Federal Habeas Corpus Proceedings Presents an Exceedingly Important Federal Question.

In addition to implicating a question that has divided the lower courts, this case raises a federal issue of substantial importance to our federal system -- the States' sovereign authority to determine for themselves when to exercise exhaustion rights and when not to. In relying on principles of federalism and comity to send this *Brady* claim back to the state courts, *O'Guinn*, 88 F.3d at 1413, the Sixth Circuit turned time-honored exhaustion rights upside down and inside out. It turned them upside down because the federalism and comity concerns underlying exhaustion belong to the States, not to the federal courts or to criminal defendants. States therefore should be as free to waive exhaustion as they are to assert it. Nothing in the Constitution specifically or federal law generally prevents states from choosing to take their chances in federal court on an unexhausted claim.

The court turned these exhaustion principles inside out because this is not a case lacking an evidentiary record sufficient to inform resolution of the habeas claims. Quite to the contrary, the district court held an evidentiary hearing on

the issue, which in conjunction with the pre-existing record, supplied more than enough evidence to assess the *Brady* claim at least if the elaborate separate writings for the court on this claim are any indication. *See O'Guinn*, 88 F.3d at 1418-21 (Merritt, C.J. concurring) and *id.* at 1435-39 (Batchelder, J. dissenting).

Notably, *Granberry v. Greer*, 481 U.S. 129 (1987), suggests (if not holds) that States may waive exhaustion. In that case, the state failed to raise exhaustion as a defense at the outset of the proceedings, and the Court held that it had been waived. Surely the greater right to waive exhaustion inadvertently includes the lesser right to do so expressly. In the end, exhaustion is simply a shield designed to protect the States' interest in addressing and rectifying, if necessary, constitutional issues arising out of state court proceedings. But this states-rights doctrine is not a sword to be wielded by defendants, defense counsel, or the federal courts to preclude the timely carrying out of criminal sentences.

As this Court has previously recognized, the States have an interest in obtaining expeditious review of habeas cases by the federal courts. For example, *In Re Blodgett*, 502 U.S. 236, 239 (1992), notes that

> the State of Washington has sustained severe prejudice by the two-and-a-half year stay of execution. The stay has prevented Washington from exercising its sovereign power to enforce the criminal law, an interest we found of great weight in *McClesky* when discussing the importance of finality in the context of federal habeas corpus proceedings.

Nor, of course, do interests of comity advance the lower court's decision. "Respect should not turn into a fetish for

non-precedence with the federal Alphonse endlessly insisting that the state Gaston pass first through the doorway without regard for Gaston's wishes." *McGee*, 722 F.2d at 1211. A federal court's refusal to accept an express waiver of exhaustion, in short, undermines rather than advances comity interests. The decision below should be reviewed -- and reversed.

## CONCLUSION

For these reasons, Amici respectfully submit that the Court should grant the petition for a Writ of Certiorari.

Respectfully submitted,

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